Petition

81-206

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No. ....

IN THE

Supreme Court of the United States

October Term, 1981

LEWIS AKMAKJIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

To the United States Court of Appeals
For the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

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Questions Presented.

1. Whether Statutes of Limitations, such as 26 U.S.C. §6531, are jurisdictional in federal criminal cases.

2. Whether a defense based upon the prior expiration of the Statute of Limitations can be waived by the defendant.

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PETITION FOR A WRIT OF CERTIORARI.

Petitioner, LEWIS AKMAKJIAN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered June 1, 1981, affirming his conviction under 26 U.S.C §7206(1), and that on hearing the judgment of conviction be reversed.

Opinions Below.

The opinion of the Court of Appeals is reported at 647 F. 2d 12 (1981) and is reproduced in the appendix herein.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 1, 1981.

No rehearing has been requested.

This Court has jurisdiction under 28 U.S.C. §1254(1).

Statutory Provisions Involved.

26 U.S.C. §6531
26 U.S.C. §7206(1).

These provisions are set forth in full in the appendix hereto.

Statement of the Case.

On April 15, 1975, a magistrate's complaint was sworn out before Honorable James J. Penne, U.S. Magistrate, alleging that appellant, Lewis Akmakjian, had violated §7206(1) of Title 26 of the United States Code on or about April 15, 1969. On May 6, 1975, the complaint was dismissed in response to a motion made by the United States Attorney by order of Magistrate Penne. An indictment was then issued on January 12, 1976, by the Grand Jury in and for the Central District of California, charging appellant with a violation of §7206 of Title 26 of the United States Code on or about April 13, 1969, (Count I); a violation of the same code section on or about April 12, 1970, (Count II); a violation of §7206(1) of Title 26 of the United States Code on or about April 13, 1969, (Count III); a violation of the same code section on or about April 12, 1970, (Count IV); a violation of §1001 of Title 18 of the United States Code on or about July 13, 1971, (Count V); and a violation of the same code section on or about July 20, 1972, (Count VI).

Appellant filed a motion to dismiss Counts I and III as barred by the applicable Statute of Limitations, 26 U.S.C. §6531. This was set to be heard on March 22, 1976, in the District Court. However, prior to the hearing of the motion, and on or about March 16, 1976, an agreement was entered into between the United States Attorney and attorneys for appellant regarding a plea to be entered into by appellant.

On March 29, 1980, appellant moved to withdraw his plea of not guilty to Count III of the indictment and to enter a plea of guilty thereon. He was sentenced on Count III on April 26, 1976, and the other five counts were, at that time, dismissed.

Appellant thereafter complied with all conditions of his probation and completed his sentence.

On July 1, 1980, the District Court, Honorable Warren J. Ferguson, Judge Presiding, denied appellant's motion to set aside Count III of the indictment and to dismiss said count as barred by the Statute of Limitations for the reasons that Rule 35 of the Federal Rules of Criminal Procedure was not the proper remedy for the relief sought, and, further, that the Statute of Limitations is not jurisdictional and was unequivocally waived by the defendant at the time he entered his plea of guilty.

Thereafter, appellant filed a further motion to set aside the plea of guilty to Count III of the indictment and to dismiss said Count as barred by the Statute of Limitations, based upon Section 2255 of Title 28 of the United States Code. A hearing was held on the motion on September 22, 1980. The District Court, Honorable Warren J. Ferguson, Judge Presiding, ordered that the motion was denied for the following reasons:

> "1. The Statute of Limitations is not jurisdictional and may be waived by a defendant; and
>
> "2. Defendant Akmakjian unequivocally and knowingly waived his Statute of Limitations defense to Count III at the time he entered his plea of guilty to Count III."

Petitioner appealed the order to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals held, on June 1, 1981, that, although the indictment was

untimely, the Statute of Limitations is nonjurisdictional and can be waived, and affirmed petitioner's conviction.

Petitioner seeks review of the affirmance of the conviction, and review of the finding that the Statute of Limitations is nonjurisdictional and can be waived.

REASONS FOR GRANTING THE WRIT.

Certiorari is warranted in this case because of a clear disagreement between the Circuit Courts of Appeals on the question of whether or not the Statute of Limitations in a federal criminal case may be waived. The recurring nature of the question reflects that a basic tenet of justice is left subject to more than one interpretation in the absence of a pronouncement by this Court.

The Tenth Circuit, in the case of *Waters v. United States*, 328 F. 2d 739, 743 (10th Cir. 1964), characterized the Statute of Limitations as ". . . a limitation upon the power of the sovereign to act against the accused," and concluded it was jurisdictional and could be raised at any stage of the proceedings.

However, the Ninth Circuit, in the present case, found that a defense based on the Statute of Limitations is non-jurisdictional and can be waived.

I.

The Federal Courts of Appeals Are in Disagreement Regarding the Nature of a Defense Based Upon the Statute of Limitations.

Although the highest courts of other jurisdictions among the United States have held that Statutes of Limitations in criminal cases may not be waived, because they impose a limit upon the power of the state to prosecute, this Court has not decided the issue. This problem has, therefore, been scrutinized by a number of the federal circuits, in distinctive fact situations.

United States v. Wild, 551 F. 2d 418 (D.C. Cir. 1977), discussed whether or not the Statute of Limitations could be raised as a defense where the defendant had waived it in writing before the Statute ran. In the particular fact situation, discussed at page 423 of *Wild*, the reasons for al-

lowing a waiver were termed very strong. The statute had not run before the waiver was made. The government was ". . . prepared to seek an indictment before the statute ran, and it was only after the intercession of defendant's attorney that they agreed to wait." [*Id.* at 424]. Under those circumstances, the District of Columbia Circuit upheld the waiver. *Wild*, however, dealt with a waiver before the Statute ran, and not a prior expiration of the statute, such as occurred in the present case.

In contrast, the Tenth Circuit, in *Waters*, reversed a conviction which was based upon an information obtained after the Statute of Limitations had run. The defense of the Statute was not raised at any time until upon appeal of the action. [*Id.* at 742]. In reversing the conviction and dismissing the information, the court explained,

> "The language of the statute clearly provides that no person shall be prosecuted, tried or punished for the offense charged here, unless the information is instituted within three years after the commission of the offense. It is plainly a limitation upon the power to prosecute or to punish. It is, therefore, jurisdictional, and noticeable at this stage of the proceedings."

The Eighth Circuit, in *Taylor v. O'Grady*, 113 F. 2d 798, 799 (1940), has pronounced that a Statute of Limitations is a limit upon the state's power:

> "Clearly, if the three-year statute of limitations was applicable the action was barred and the court was without power to try petitioner for the crime committed or to impose sentence on him nine years after the event."

In determining whether the Statute of Limitations can be raised for the first time on appeal, the Circuits looked for any pronouncement by this Court which could serve as guidance. The only apparent guidance on the issue came

from two very old cases, *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872), and *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917). *Biddinger* held that the Statute of Limitations is an affirmative defense that must be raised at the trial court level (*Id.* at 135), while *Cook* followed the time-worn theory that the Statute of Limitations, to act as a defense, must be so pleaded at the trial court level. These cases, which today bear re-examination, form the anchor for the thin string of reasoning of the cases of *United States v. Krasn*, 614 F. 2d 1229 (9th Cir. 1980), *United States v. Doyle*, 348 F. 2d 715 (2d Cir. 1965) and *United States v. Parrino*, 212 F. 2d 919 (2d Cir. 1954).

The Ninth Circuit, in *United States v. Krasn, supra*, at 1236, followed this line of cases in deciding the question, distinct from that of the present case, of whether a defendant in a criminal case can raise the issue of the Statute of Limitations for the first time on appeal. This question had also been considered by the Second Circuit in *United States v. Doyle, supra*, at 718, and in *United States v. Parrino*. In each of these cases, appellants from criminal convictions were not allowed to raise the Statute of Limitations as a defense on appeal.

However, as confronted in *Waters, supra*, at 743, notwithstanding the narrow holding of *Cook* and *Biddinger*,

> ". . . if recognition of a distinction between the statute of repose in civil cases and the substantive bar in criminal cases is to have any meaning in the administration of criminal justice, the Statute of Limitations must be held to affect not only the remedy, but to operate as a jurisdictional limitation upon the power to prosecute and punish."

Since petitioner herein properly raised the issue of the Statute of Limitations as a bar to the government's power to prosecute at the trial court level, the instant issue is not

dismissed by the rulings of *Cook* or *Biddinger*.[1] If *Waters* is correct, petitioner's conviction must be reversed, and the onus of his conviction lifted. A question of this importance should not be left with varying interpretations between the Circuits.

II.

State Courts Have Declared the Statute of Limitations to Be Jurisdictional, a Limitation Upon the Power to Prosecute.

The determination that the Statute of Limitations is jurisdictional is the favored rule in American jurisprudence. Among the jurisdictions joining in the determination in *Waters* are the following.

California's Supreme Court has declared, "It has long been established that the Statute of Limitations is jurisdictional in nature, and that '[t]he point may therefore be raised at any time, before or after judgment.' " *In re Demillo*, 14 Cal. 3d 598, 601, 121 Cal. Rptr. 725, 535 P. 2d 1181 (1975), following *People v. McGee*, 1 Cal. 2d 611, 613, 36 P. 2d 378, 379 (1934).

The Supreme Court of Alaska has stated,

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[1] *United States v. Harris*, 133 F. Supp. 796, 799 (W.D. Mo. 1955), aff'd on other grounds, 237 F. 2d 274 (8th Cir. 1956). The Court in *Harris* explained that he had found many cases which stemmed from *United States v. Cook* which held that "the bar of the statute of limitations in actions pending in a Federal Court is a matter of affirmative defense, and cannot be raised by a demurrer to the indictment or information, but only by a plea in bar." However, he went on to say that the cases all rested on the principle in *Cook* that the prosecution must be allowed the opportunity, in meeting the defense of limitations, to show the existence of some exception. In *Cook*, the exception written into the statute was one of absence of the defendant from the state. Since no such exception was present in *Harris*, the Court concluded that the Court was deprived of jurisdiction to pronounce a guilty plea by the operation of the applicable statute. *Id.* at 798-99.

"Just as a defendant may not be charged with a time-barred offense, he may not be convicted of it, even as a lesser offense included in one which is not time barred. . . . This conclusion follows from the principles that the Statute of Limitations is to be construed in favor of the defendant, and that the Statute of Limitations is jurisdictional."

Padie v. State, 557 P. 2d 1138 (Alaska 1976).

In *City of Cleveland v. Hirsch*, 208 N.E. 2d 600, 601 (1971) the Court of Appeals for Ohio, Cujahoga County, summarized the state of the law thusly:

"It is well recognized that a statute of limitations, in a civil case, is an affirmative defense, which is deemed waived if not timely asserted by way of answer, or in certain cases by a demurrer or by a motion to dismiss.

"But the nature of statutes of limitations pertaining to criminal prosecutions is quite different. It is universally held that such statutes cannot be waived by failure to assert them, but may be raised any time, before or after conviction."

The Court continued, at page 602:

"Numerous cases from other states have held that a statute of limitations may be raised as a defense to a criminal prosecution after judgment has been entered. State v. Civilla (Mo.App. 1963), 364 S.W. 2d 624; State v. Morris (1959), 81 Idaho 267, 340 P.2d 447; McIlwain v. State (1956), 226 Ark. 818, 294 S.W. 2d 350; State v. Tennyson (1944), 73 N.D. 259, 14 N.W. 2d 171; People v. McGee (1934), 1 Cal. 2d 611, 36 P. 2d 378; Nelson v. State (1879), 17 Fla. 195."

". . . We believe the majority and better view is that an indictment, information, or affidavit which charges a violation of law, but which also shows that the prosecution for the charged violation of law is

> barred by the statute of limitations, necessarily also shows that a court is without jurisdiction to hear the prosecution. If a trial court lacks jurisdiction of a case, its judgment in the case is void, and may be attacked at any time. Jurisdiction cannot be conferred upon a court by any act or omission of the parties, hence, the defense of the statute cannot be waived by failure to raise it."

See also Bustamonte v. District Court, 138 Colo. 97, 329 P. 2d 1013 (1958), *Mitchell v. State*, 25 So. 2d 73, 74, 157 Fla. 121 (1946), and *State in Interest of B.J.*, 270 A. 2d 72, 74, 112 N.J. Super. 1 (1970), in which it was stated, "The lapse of the statutory period for prosecution is not a procedural defense; it is substantive and jurisdictional."

It is earnestly argued that the holding of the highest courts of California, Colorado, Alaska, Missouri, Ohio, Florida, North Dakota, Arkansas, New Jersey, and Idaho, among others, are correct in ruling that Statutes of Limitations in criminal cases are jurisdictional, and therefore cannot be waived. The time is ripe for decision of this issue by the Supreme Court of the United States.

III.

Strong Policy Considerations Support the Pronouncement of the Statute of Limitations as Jurisdictional in the Federal Courts.

The Statute of Limitations in a criminal case is an act of grace which reflects a legislative determination that the purposes of the criminal law may best be served by limiting the state's power to proceed in particular cases.[2] Generally, the power to prosecute is unlimited as to time, but Congress has consciously decided to enact limitations such as are

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[2]Note, The Statute of Limitations in Criminal Law: a penetrable barrier to prosecution, 102 U. of Penn. L. Rev. 630 (1954).

embodied in 26 U.S.C. §6531, the applicable statute in this case. One of the purposes for such Statutes of Limitation has previously been discussed by this Court.

In *United States v. Marion*, 404 U.S. 307, 322-23 (1971), this Court noted:

> "The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in United States v. Ewell, supra, at 122, 'the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale ciminal charges.' Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence.'' Public Schools v. Walker, 9 Wall. 282, 288 (1870). These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. As this Court observed in Toussie v. United States, 397 U.S. 112, 114-115 (1970):
>
> " 'The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.' "

Generally, purposes for Statutes of Limitation which have been articulated include a desire to insure that the prosecution will be based upon evidence which is reasonably fresh and therefore more trustworthy than that which has become "stale"; a desire to insure vigilance on the part of state officials in bringing violators to justice as speedily as possible; and to further the aims of the criminal law to rehabilitate wrongdoers and to free the citizen from the fear of prosecution for old crimes, by providing a measure of protection for the individual against the power of the state.[3]

These purposes are thwarted by an interpretation that the Statute of Limitations may be waived by the defendant after it has run. If the prosecution still stands as a "club" with which the government can bargain a plea of guilty from a defendant, there is no repose. If the government can still obtain a conviction after the statute has run, the Statute of Limitations is no Limitation upon the state's power at all, but is simply a personal right of the defendant. This result is not supported by the stated legislative purposes for having Statutes of Limitation, as expressed in numerous state opinions and by federal opinions including *Waters* and *Taylor*.

Conclusion.

Petitioner herein presents a case of a waiver of the Statute of Limitations after the statute in question, 26 U.S.C. §6531, had expired. Although the *Cook* and *Biddinger* cases, decided many years ago, discussed when the Statute of Limitations question could be raised, no case decided by this Court has ever squarely dealt with the question of whether a defense based upon the prior expiration of the Statute of Limitations may be waived by the defendant. The

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[3] *Id.* at 633-34. See also: Note, Waiver of the Statute of Limitations in Criminal Prosecutions: United States v. Wild, 90 Harv. L. Rev. 1550, 1554 (1977).

Ninth Circuit, in ruling on petitioner's case, has said yes; the Tenth Circuit, in *Waters*, has said no. The vast majority of state courts also have said no, the only result which would comport with the reasons for enacting a Statute of Limitations. The issue will surely be raised repeatedly in the years to come until it is settled by this Court. Defendants in criminal cases brought in the federal system will continue to be unsure as to the effect of past violations on their vulnerability to prosecution. For each of the foregoing reasons, therefore, petitioner hereby prays that a hearing be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeals.

United States Court of Appeals, Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Lewis Akmakjian, Defendant-Appellant. No. 80-1677.

Argued and Submitted May 4, 1981. Decided June 1, 1981.

Appeal from the United States District Court for the Central District of California.

BEFORE ELY, PREGERSON, and NELSON, Circuit Judges.

PER CURIAM:

Akmakjian appeals the denial of his petition under 28 U.S.C. §2255 requesting that his guilty plea be vacated on the ground that the indictment was barred by the statute of limitations. In denying the petition, the district court held that the alleged defense of untimeliness was nonjurisdictional and had been expressly waived by Akmakjian when he entered his plea of guilty. We affirm.

Facts

On April 15, 1975, the Government filed a complaint against Lewis Akmakjian, charging him with filing a false federal income tax return for the calendar year 1968, in violation of 26 U.S.C. §7206(1). On May 6, 1975, the complaint was dismissed on the Government's motion that the ends of public justice did not require prosecution.

On January 12, 1976, Akmakjian was indicted for six tax offenses occurring in 1969-72. Count 3 of the indictment charged the same offense that had been charged in the previously dismissed complaint. Akmakjian moved to dismiss counts 1 and 3 as barred by the statute of limitations. Before

the hearing on the motion, however, Akmakjian entered into a plea agreement with the Government and pleaded guilty to count 3. The remaining counts were dismissed. Before accepting the guilty plea, the district court ascertained that Akmakjian knew that the statute of limitations presented a possible defense to count 3. Nevertheless, Akmakjian expressly waived the defense and the district court accepted his plea.

Four years later, Akmakjian filed a petition under 28 U.S.C. §2255 to set aside the guilty plea to count 3 on the ground that the statute of limitations barred his indictment on that count. The district court denied the petition on the ground that Akmakjian had waived the statute of limitations defense at the time he entered his guilty plea. This appeal followed.

Discussion

The statute of limitations for income tax evasion requires the Government to obtain an indictment within six years of the commission of the offense with the proviso that:

> [w]here a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States.

26 U.S.C. §6531.[1] Akmakjian was indicted six years, eight months, and twenty-seven days after the alleged violation.[2]

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[1]All powers and duties conferred upon United States commissioners have been conferred by statute upon United States magistrates. 28 U.S.C. §636(a)(1).

[2]Although the alleged illegal act occurred on April 13, 1969, for purposes of the statute of limitations, it is deemed to have occurred on April 15, 1969. *United States v. Habig*, 390 U.S. 222, 225, 88 S.Ct. 926, 928, 19 L.Ed.2d 1055 (1968).

Therefore the indictment was timely only if the tolling provision of section 6531 was activated.

In *Jaben v. United States*, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345 (1964), the Supreme Court held that only a complaint establishing probable cause to believe that an offense had been committed activates the nine-month extension of the statute of limitations. In so holding, the Court addressed the policy concerns behind the nine-month extension of the statute of limitations. The tolling provision "was not meant to grant the Government greater time in which to make its case (a result which could have been accomplished by making the normal period of limitation six years and nine months), but rather was intended to deal with the situation in which the Government has its case made within the normal limitation period but cannot obtain an indictment because of the grand jury schedule." *Id.* at 219-20, 85 S.Ct. at 1368. The statute must be interpreted "to prevent the Government from filing a complaint at a time when it does not have its case made, and then using the nine-month period to make it." *Id.* at 220, 85 S.Ct. at 1368. The Court further stated: "A dismissal of the complaint before the indictment is returned would vitiate the time extension." *Id.*

We adopt the Supreme Court's language in *Jaben* and hold that where, as here, the Government successfully moves to dismiss the complaint, the nine-month extension of section 6531 is vitiated. Acceptance of the Government's position that the nine-month extension applies whenever a sufficient complaint is timely filed would mean that the Government could obtain the nine-month extension by simply filing an adequate complaint and immediately moving for dismissal. The normal statute of limitations period would effectively become six years and nine months—a result con-

trary to the policies underlying the tolling provision and disfavored by the Supreme Court in *Jaben*.

Although the indictment here was untimely, Akmakjian's conviction must still stand. The Supreme Court has held that the statute of limitations is an affirmative defense that is waived unless raised at trial. *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135, 38 S.Ct. 41, 43, 62 L.Ed. 193 (1917). *See also United States v. Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980). Thus, contrary to Akmakjian's argument, a defense based on the statute of limitations is nonjurisdictional and can be waived. Here Akmakjian expressly stated in open court, apart from his plea of guilty, that he wished to waive the statute of limitations defense. Accordingly, we affirm his conviction.

AFFIRMED.

APPENDIX B.

Statutes Cited.

§6531. Periods of limitation on criminal prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States;

and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable. Aug. 16, 1954, c. 736, 68A Stat. 815.

§7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or

other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Opposition

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No. 81-206

In the Supreme Court of the United States

OCTOBER TERM, 1981

LEWIS AKMAKJIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner collaterally attacks under 28 U.S.C. 2255 his conviction resulting from a guilty plea to one count of willfully filing a false tax return, in violation of 26 U.S.C. 7206(1). The district court sentenced petitioner to an 18-month term, execution of which was suspended. It placed petitioner on probation for five years on the condition that he pay a $5,000 fine and contribute 500 hours of community service for four years (C.R. 14).[1] The question presented is whether petitioner, having expressly waived the defense of statute of limitations as part of a plea bargain, may collaterally attack his conviction on the ground that prosecution of the offense to which he pleaded guilty was barred by the statute of limitations.

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[1] "C.R." refers to the clerk's record in the court of appeals.

1. The pertinent facts may be summarized as follows: On April 15, 1975, the government filed a complaint charging petitioner with filing a false federal income tax return for the calendar year 1968, in violation of 26 U.S.C. 7206(1).[2] On May 6, 1975, the complaint was dismissed on the government's motion. Thereafter, on January 12, 197[illegible], petitioner was indicted for six tax offenses occurring from 1969 through 1972. Count 3 of the indictment charged the same offense that had been charged in the previously dismissed complaint (Pet. App. 1). Petitioner moved to dismiss Counts 1 and 3 of the indictment as barred by the statute of limitations. Prior to the hearing on his motion, however, petitioner entered into a plea agreement with the government pursuant to which he pleaded guilty to Count 3 and the remaining counts were dismissed. At the time of his guilty plea, petitioner expressly waived any statute of limitations defense to Count 3 of the indictment (Pet. App. 1-2).

Four years later, after he had served his sentence, petitioner filed a motion under 28 U.S.C. 2255 to set aside his conviction on the ground that Count 3 of the indictment had been barred by the statute of limitations. The district court denied the relief sought, holding that the statute of limitations is not a jurisdictional bar to prosecution, but is an affirmative defense that petitioner had unequivocally waived at the time he entered his guilty plea (Pet. App. 2). The court of appeals affirmed (*id.* at 4).[3]

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[2]For purposes of the statute of limitations, the filing of the allegedly false return is deemed to have taken place on April 15, 1969. *United States* v. *Habig*, 390 U.S. 222, 225 (1968).

[3]The court of appeals also concluded that the nine-month extension of the period of limitations contained in Section 6531 of the Internal Revenue Code of 1954 (26 U.S.C.), was inoperative in this case (Pet. App. 2). In view of the court's affirmance of the district court's denial of petitioner's motion under 28 U.S.C. 2255 on the ground that petitioner waived his rights, that holding need not be addressed here.

2. As petitioner recognizes (Pet. 6-7), this Court has held that the statute of limitations is an affirmative defense that must be pleaded by a defendant. *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917); *United States* v. *Cook*, 84 U.S. 168, 178-179 (1872). Accordingly, the courts of appeals generally agree that the statute of limitations is not a jurisdictional bar to prosecution, but is an affirmative defense that can be waived. *United States* v. *Krasn*, 614 F. 2d 1229, 1236 (9th Cir. 1980); *United States* v. *Wild*, 551 F. 2d 418, 421-425 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); *United States* v. *Kenner*, 354 F. 2d 780, 785 (2d Cir. 1965), cert. denied, 383 U.S. 958 (1966); *United States* v. *Doyle*, 348 F. 2d 715, 718-719 (2d Cir.), cert. denied, 382 U.S. 843 (1965); *Askins* v. *United States*, 251 F. 2d 909, 913 (D.C. Cir. 1958); *United States* v. *Parrino*, 212 F. 2d 919, 922 (2d Cir.), cert. denied, 348 U.S. 840 (1954); *Forthoffer* v. *Swope*, 103 F. 2d 707, 709 (9th Cir. 1939); *Martin* v. *Biddle*, 16 F. 2d 118, 119 (8th Cir. 1926).

Although the Tenth Circuit has disagreed with other courts to the extent of permitting a criminal defendant to raise the defense of the statute of limitations for the first time on appeal (*Waters* v. *United States*, 328 F. 2d 739 (1964)), it had earlier held that the statute of limitations was not available in a collateral attack on a criminal conviction (*Roberts* v. *Hunter*, 140 F. 2d 38 (1943)), and it reiterated that statement in the course of its *Waters* opinion (328 F. 2d at 743). *Waters* therefore does not conflict with the decision below. And, of course, the Tenth Circuit did not rule upon the effect of an explicit waiver of the statute of limitations, as was here present.[4]

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[4] *Taylor* v. *O'Grady*, 113 F. 2d 798 (8th Cir. 1940), also invoked by petitioner (Pet. 6), arose on a petition for habeas corpus by a prisoner convicted in the Nebraska courts. The court of appeals acknowledged that, under Nebraska criminal law, the statute of limitations was jurisdictional, but it held that the statute had been tolled by the defendant's status as a fugitive.

Contrary to petitioner's contention (Pet. 10-12), none of the purposes of the statute of limitations (see *United States* v. *Marion*, 404 U.S. 307, 322 (1971); *Toussie* v. *United States*, 397 U.S. 112, 114-115 (1970)) would be served by affording him relief under the facts of this case. Petitioner, who was represented by counsel, was aware of the possible existence of a statute of limitations defense and made an informed tactical decision to waive the defense and plead guilty to one of six counts against him. Since this waiver was part of the consideration running to the government under the plea agreement, in exchange for which the other counts of the indictment against him were dismissed, it would be wholly unjust now to permit petitioner to retract his decision. See *United States* v. *Parrino, supra*, 212 F. 2d at 922.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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